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CHARLES ELMER DODD, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 116

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE
SCHREIB, Mayor of the Village of East Rochester, and
FOUR TRUSTEES of said Village,

Respondents.

BRIEF FOR RESPONDENTS

In Opposition to Petition for Writ of Certiorari

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Reference Marks:

"R" with numeral means page of printed record.

"D.S." means Despatch Shops, Inc.

"D.S.B." means Despatch Shops, Inc. Brief.

Numbers standing alone mean folios of printed record.

"F" with numeral means a finding of fact.

"R.G. & E." means Rochester Gas & Electric Corpora-
tion.

Opinions in Courts Below.

Village East Rochester v. R. G. & E. Corp., 262 A. D. 556.

O'Flynn v. Village East Rochester, 292 N. Y. 156.

A.

Statement of the Case

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A.

STATEMENT OF THE CASE

The following are, we believe, the facts to which the law is to be applied:

1. Reasons for Planning the Project.

R.G. & E., a gas and electric utility, has been serving the Village for a long period of years. It still continues and will continue so to do. In 1933, its rates for lighting the Village streets were questioned. After protest, the rates were somewhat reduced but only to an amount which the Village believed still to be excessive, and which were much more than the cost of the same service which might be rendered by a Village Plant. The Village, being unable to secure a further deduction, determined to establish a municipal plant under the provisions of the General Municipal Law of the State of New York for the principal purpose of operating its water system; the lighting of streets and public buildings; and other Village purposes. As an incident and to reduce the cost of energy consumed by itself it determined to build a generating plant somewhat larger than needed for its own purposes and sell the excess to private consumers. (R. 303, 305, 308, 312, 367, 368, 369, 370).

2. The Situation Generally.

It was recognized by all concerned that the project would and must be competitive. (F. 21; R. 161, R. 61.) D.S. admits that it was to be competitive; that it would not be permitted to serve all. (D.S.B. p. 7.)

R.G. & E., beyond question, would continue to serve. It was certain that, regardless of the size of the *generating*

plant, D.S. would not purchase energy from the Village but would continue to purchase from R.G. & E. because the R.G. & E. rates to D.S. were so low that the Village could not expect to gain D.S. as a customer. (F. 29; R. 163.)

R.G. & E. serves a vast area in many counties, including the City of Rochester. If the Village were to build a *generating* plant large enough to supply D.S., the cost of serving D.S. would be greater than the price charged D.S. by R.G. & E. It would operate only an isolated plant in a very limited area. The present wholesale rate charged by R.G. & E. to D.S. is \$1.12 per Kwh. which is well below the cost of production of any plant operated as an isolated unit and serving only the Village. (R. 289; R. 525.)

The problem confronting the Village was how much energy *could* be sold, and, therefore, how large a generating plant should be built. The size of the generating plant had nothing to do with the capacity of the distributing system which was adequately planned for distributing to all including D.S. It was also recognized that even all of the inhabitants would not take from the Village plant but would continue to take from R.G. & E.

3. *Waste Involved if Larger Generator Were Built—Losses.*

The cost of the project, with the generating plant specified and a distributing system adequate to serve all, including D.S., was \$360,000. (F. 24; R. 162.)

To construct a plant sufficient to *generate* the peak load of D.S. would cost \$900,000. (F. 68; R. 172; F. 26; R. 162).

To build a generating plant large enough to *generate* the peak load of D.S. would involve an operating loss to be met

by taxation upon all—including a large loss to D.S. Of course, rates could be increased so as to obviate such a loss, but this would mean that if D.S. were to buy, its rates would compare still more unfavorably with those established by R.G. & E. And, if D.S. did not take, the operating deficit would then be much larger. D.S. would not buy. (F. 27; R. 162.)

And so the Village determined to build a generating plant which would be *adequate to generate* all the current which would be necessary to serve all consumers who could be expected to take. If D.S. did so insane a thing as to purchase from the Village at much greater rates than it was enjoying from R.G. & E., the Village could serve it through purchased energy.

The losses incurred by operating a generating plant large enough to generate the peak load of D.S. would be caused in part by the violent fluctuations in D.S. demands.

The consumption of D.S. for certain years was as follows:

- 1929—6,000,000 Kwh.
- 1930—6,000,000 Kwh.
- 1933—1,000,000 Kwh.
- 1934—1,000,000 Kwh.
- 1938—1,000,719 Kwh.
- 1940—6,000,540 Kwh. (12 months ending 8/1/40)

(F. 22; R. 161.)

The annual consumption of the Village, excluding D.S., is approximately 3,000,000 Kwh. A purchase by D.S. of 6,000,000 Kwh. in any one year would represent two-thirds of the total consumption of the Village, while a consumption of 1,000,000 Kwh. in any one year would represent one-fourth of the total consumption of the Village.

However, the Village could buy and sell to D.S. The Court so found. (F. 30; R. 163; Ex. 12; In evidence R. 245; appears R. 506; particular reference R. 572.)

(See Subsection 2 of Section 360 of General Municipal Law in Appendix.)

The excess in the cost of construction of a generating plant adequate to generate for D.S. over the cost of the plant in contemplation would be more than \$500,000. To produce 1,719,000 Kwh. in a year such as the year 1938 with a bond issue of \$900,000 would involve an *additional* bond amortization and interest of \$48,600 in the first year, and an increased cost for fuel oil of \$9,240, making a net increased cost to the Village of \$57,840 over and above the cost of the proposed plan. But in 1938, D.S. paid for its energy only \$30,209 (R. 343, 344, 505.) In the same circumstances, in 1933 or 1934 the cost to the Village in each year to serve D.S. would have been approximately \$54,750 (R. 379, 380), but the amount paid by D.S. to R.G. & E. for energy in each of those years was in the neighborhood of \$18,000 (F. 26; In evidence R. 347, appears at R. 637). In other words, the loss to the Village in each of those years would be in the neighborhood of \$36,750. This loss, being paid through taxes, would cost the D.S. 7% of the loss, because D.S. pays 7% of the total taxes. (R. 344; D.S.B. 5.) Ninety-three (93%) per cent would be borne by the people of the Village. If the \$900,000 plant were built and if D.S. did not buy, the additional cost in the first year would be \$48,600 for Bond retirement and interest caused by a plant with nearly three times as large a capacity as the one planned—two-thirds of which could not be used. And yet D.S. claims that the General Municipal Law requires that such a loss must be incurred if any plant is to be built. Such a conclusion would deprive the benefits of

the General Municipal Law to all villages in a situation such as ours.

4. *D.S. will benefit under the proposed plan, but a plan involving a generator which it is claimed must be built would be a distinct disadvantage to it.*

The State Court found that the project "would result in a benefit to Despatch Shops, Inc. and a lower tax liability than under any plan involving the construction and operation of a generating plant large enough to serve all the demands and requirements of Despatch Shops, Inc." (**F.** 28; R. 162.)

D.S. would be benefited under the present plan by the result of:

- a. Three times the street lighting at about one-third of the present cost. (R. 312; 313.)
- b. A lesser cost for energy used by the Village, e. g. for operating the Village water plant, lighting fire houses, and public buildings, and energy used for other general and Village purposes.
- c. Sharing in the general community benefits for itself and 1,200 of its employees, most of whom reside in the Village. (**F.** 60; R. 169.)
- d. The project will be "self-liquidating and profitable and will not involve any deficit in the cost of operations to be met by a general tax". (**F.** 33; R. 164.)
- e. Even if, contrary to the findings of fact, a loss in operations were to be incurred, the "loss could be immediately liquidated by an increase in rates with-

out the levying of general taxes to meet any deficit.” (F. 34; R. 164.) (*Village of Boonville v. Maltbie*, 272 N. Y. 40; 245 A. D. 468.)

It is indisputable that as a matter of law a municipal utility is entitled, the same as a private utility, to a reasonable return upon all of its property used and useful in the public service. (*Matter Village of Tupper Lake v. Maltbie*, 257 A. D. 753, 756.)

“The possible lack of wisdom is not the lack of authority.” (*Kelly v. Merry*, 262 N. Y. 151, 169.)

See also:

McCabe v. City of New York, 213 N. Y. 468.

Talcott v. City of Buffalo, 125 N. Y. 280, 288.

Pilbeam v. Sisson, 204 A. D. 762, 767.

f. For D.S. to buy energy generated by the Village plant would cost the D.S. even more though the rates were not raised.

No question is raised, and none could be successfully raised, as to the power of the Village, with the approval of its electorate, to establish a plant even though rates were higher than the rates which another utility might charge.

5. *The Ordinance.*

a. The ordinance did not provide for the exclusion of any consumer and did not exclude the purchase of energy by the Village, and its sales to D.S., in the event that D.S. should, improvidently and in utter disregard of its own interests, conclude to buy.

- b. It did not suggest that all energy delivered would be generated at a Village generating plant.
- c. The Statute does not require that any or all energy sold must be generated at a municipal plant.
- d. To buy and sell to D.S. requires only a distribution system and the proposed distribution system would be adequate to serve all of D.S. demands. The ordinance defined "system of furnishing" as including the distribution system. (Ordinance Section 1 (b) R. 25, 26.)

z

6. *The Village Solution of the Problem.*

The Village determined not to build a generating plant whose capacity would generate three times the current which could be sold. It determined to build a plant which would be profitable and avoid any possible question of general taxes to cover an operating deficit. It decided to exercise ordinary common sense.

No intelligent person would plan to build a plant whose capacity would be three times the capacity necessary to satisfy a normal demand merely to meet an occasional temporary maximum demand, particularly when the overwhelming probabilities (and in this case a certainty) were that there never would be any such maximum demand. The plan was designed to meet a maximum normal demand under *competitive* conditions. The contention of the petitioner, if adopted, would require that each of two or more competitors should build a plant large enough to meet *all demands of all customers of all competitors*. Certainly, the law does not require such waste. And the elimination of such waste is not an arbitrary and palpable abuse of power.

B.

THE ARGUMENT

—

POINT I

The action of the Village does not affect or impair the constitutional rights of the petitioner.

1. *As to the claimed taking of property in violation of the Federal Constitution.*

We have shown that D.S. would receive benefits. But even if it did not, the planned project would not be frustrated by constitutional inhibitions.

This is not a case involving special taxes or a *local improvement* or district created and established for special purposes as a restricted area in a municipality larger than itself or as an area made up of parts of two or more municipalities for special purposes, such as drainage, sewers, and others.

This case involves an area coincident with the Village and for general Village purposes. The project is a Village project. The General Municipal Law of New York creates powers, like those involved here, only to municipalities—not to “districts”. (See Appendix.) The Village project is not a “local improvement” in a district different from the Village itself. In cases like the one at Bar, benefits to all are not required unless the imposition upon the taxpayer is arbitrary and a palpable abuse of power. But the Village has not acted in an arbitrary manner and it has not attempted to exercise a palpable abuse of power.

Even in "district" cases taxes may be levied on all within the district even though some receive no benefit.

As was said in *Nashville, etc. v. Walters*, 294 U. S. 405 (a local improvement case):

"While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive *no benefit, and indeed, suffer serious detriment*; St. Louis & S. W. R. Co. v. Nattin, 277 U. S. 157, 159, 72 L. ed. 830, 831, 48 S. Ct. 438; Memphis & C. R. Co. v. Pace, 282 U. S. 241, 246, 75 L. ed. 315, 320, 51 S. Ct. 108, 72 A. L. R. 1096; so-called *assessments* for public improvements laid upon *particular property owners* are ordinarily constitutional only if based on benefits received by them."

In *Missouri Pacific Railroad Company v. Western Crawford Road Improvement District*, 266 U. S. 187, a road improvement district was created by a special act. Preliminary expenses were a first lien on all the land in the district and were to be paid by a tax on property in the district. The railroad objected to the tax upon the ground that the tax was not spread in proportion to the amount of benefits. This court said:

"So far as concerns the Federal Constitution, the validity of the tax may be rested, also, on other grounds. A state may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property specially benefited thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by *general taxation*. The cost may be defrayed out of state funds, or a tax district may be created to meet the authorized outlay. The preliminary inquiry whether it is desirable to construct the road is one in which all landowners within the district are interested. The 14th Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed."

In *St. Louis & S. W. R. Co. v. Nattin*, 277 U. S. 157, an ad valorem tax was levied as against a road district. This court said:

“As the assailed tax was *general* and *ad valorem*, its legality *does not depend* upon the receipt of any *special benefit* by the taxpayer.”

In *Valley Farms Co. v. Westchester County*, 261 U. S. 155, a taxpayer sought a cancellation of a tax to pay the cost of a sewer. The taxpayer could not be benefited by the construction and operation of the sewer. The court said:

“* * * Taxes for construction and maintenance are based wholly upon assessed valuations for general purposes. Each lot is taxed *according to value, and irrespective of benefits received.*”

* * * * *

“The argument proceeds thus:”

* * * * *

“That plaintiff's Tibbetts valley lands are so situated that they can never utilize any part of the sewer system except the lower portion of the outlet sewer, and this will be possible only through costly connections not yet planned.”

* * * * *

“The courts below have upheld the assessment under the Constitution and laws of the state. We are concerned only with application of the 14th Amendment.”

This court upheld the tax.

In *Miller, etc. v. Sacramento, etc.*, 256 U. S. 129, the taxpayer claimed that he had received no special benefits in a drainage district for which he was taxed. The court said:

“* * * the doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary

action, a state may establish drainage districts and tax lands therein for local improvements, and that *none of such lands may escape liability solely because they will not receive direct benefits.*"

See also:

Wagner v. Leser, 239 U. S. 207.

Houck v. Little River, 239 U. S. 254, 262.

Paducah-Illinois R. Co. v. Graham, 46 F. 2d 806.

Nashville, etc. v. Wallace, 288 U. S. 249.

2. *Comments on Petitioner's citations.*

None of Petitioner's citations involve a project designed by a municipality to serve its own municipal purposes as authorized by Statute. They all involved districts and local improvements except the *Los Angeles* case mentioned below. The *Los Angeles* case involved no such issues as are involved in the case at Bar.

In *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, the question was whether a tax was arbitrary and unreasonable. The improvement had to do with a railroad underpass. The railroad was compelled to pay one-half the cost. The railroad had attempted to introduce evidence in the State court to the effect that the assessment against it was arbitrary and an abuse of power. The State court refused to consider such evidence and this court held the exclusion to be error and ruled that this court had no occasion to consider the facts as to whether the tax was arbitrary and unreasonable. It reversed the State court and remanded the case for further proceedings, saying:

"While moneys raised by *general taxation* may constitutionally be applied to purposes from which the individual taxed may receive no benefit and indeed suffer detriment; * * * so-called *assessments*

for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."

In the case at Bar, the situation is entirely different. The New York Statute provides that it is a Village purpose to erect this plant, and that bonds issued to defray the cost are Village bonds to be paid by general taxation. (General Municipal Law, Section 360, Subdivision 2, and Section 362; See appendix.)

In *Memphis & C. R. Co. v. Pace*, 282 U. S. 241, a taxpayer sought to enjoin the collection of a tax which was levied to make a partial payment on bonds of a road district which had been created by statute.

Among other things, the court said:

"Whether the tax shall be *statewide* or confined to the county or local district wherein the improvement is made, and whether it shall be laid *generally on all property* or all real property within the taxing unit, or shall be laid *only on real property specially benefited*, are matters which rest in the *discretion of the state*, and are *not controlled* by either the *due process* of the equal protection clause of the 14th Amendment."

* * * * *

"Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an ad valorem basis; nor, where the tax is thus general and ad valorem, does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community."

The plaintiffs sought to show that the new roads would be of no benefit to it, and the court said:

"The chief complaint made here is that the imposition of the tax on an ad valorem basis was 'inher-

ently invalid' under the due process and equal protection clauses. That complaint is not tenable, as is shown in several cases before cited. And as the tax was general and ad valorem, its validity, as was held in *St. Louis & S. W. R. Co. v. Nattin*, 277 U. S. 157, 72 L. ed. 830, 48 S. Ct. 438, supra, 'does not depend upon the receipt of any special benefit by the taxpayer.' ”

The tax was upheld.

In *Road Improvement District 1 v. Missouri Pacific Railroad Company*, 274 U. S. 188, a taxpayer sought to annul an assessment for the cost of a road improvement. No municipal project was involved.

The Trial Court found that the assessment against the railroad was plainly arbitrary and unreasonably discriminatory. The Statute directed payment in the form of *special taxes measured by benefits*. The railroad was assessed on realty and *personalty* alike while *all others were taxed on realty alone*. This court held that the lower court finding that the tax was arbitrary was correct.

In *Thomas v. Kansas City, etc.*, 261 U. S. 481, there was a suit by a railroad to restrain the enforcement of a tax to pay for the cost of a drainage district created by special law. The Trial Court held that the tax on the railroad was palpably arbitrary for the reason that the railroad had no direct benefit and its *40.43 acres* in the district were subject to a tax of \$4,194.60, while *12,000 other acres* in the district were subject to a tax of \$3,151.52. This court said:

“The legislature's determination that lands will be benefited by a public improvement for which it authorizes a special tax is, ordinarily, conclusive. Its action in so doing cannot be assailed under the

14th Amendment, unless it is palpably arbitrary or discriminatory."

* * * * *

"To justify an assessment upon property the benefit from the improvement need *not be a direct one*. It may, in case of a railroad, consist of gains derived from increased traffic."

The holding in *City of Los Angeles v. Los Angeles Gas & Electric*, 251 U. S. 32, has no application here. The City, intending to establish its own electric system, adopted an ordinance requiring an existing public utility to remove those of its poles and other structures in areas in which the city might wish to erect installations of its own. A penalty for violation was attached. This court held that a municipality could not, as a matter of public right, clear a space for its own construction by removing or relocating the facilities of a privately owned lighting company occupying streets under a franchise legally granted, unless the owner was compensated. In the instant case, the Village does not intend to interfere with the physical properties of any one.

In *Gast v. Schneider*, 240 U. S. 55, the city by ordinance created a tax district within its own limits which was to be taxed for a street paving improvement—a local improvement. The tax was held arbitrary.

Mr. Justice Holmes, in his opinion, said:

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse."

He further said that the ordinance involved was "a far-fetched of irrational irregularities throughout."

In *Kansas City Southern Railway v. Road Improvement District*, 256 U. S. 658, the Legislature caused to be created a road improvement district. The railroad taxpayer was taxed on 9.7 miles of main track for \$67,900—or \$7,000 per mile. 11.2 miles of gravel road constituted the improvement. It was a local improvement and no standards had been set for determining benefits. The court held that the circumstances made the tax discriminatory and palpably arbitrary.

In *Houck v. Little River Drainage*, 239 U. S. 254, there was involved an action to restrain the collection of a tax to pay for the cost of a drainage district. The court said:

“And, as we have said, unless the exaction is a flagrant abuse, and by reason of its *arbitrary* character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power.”

In *Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, a drainage district had been established, but by reason of the contour of the land within the district the elevated land of the taxpayer could not receive any benefit whatsoever, the whole purpose being for drainage. The court accentuated the fact that a drainage district has a special purpose of the *improvement of particular property*, and that where there could be no drainage of a taxpayer's property the tax would be arbitrary. This *Myles* case was distinguished by this court in *Mount St. Mary's Cemetery Association v. Mullins*, 248 U. S. 501, which involved a sewer assessment.

In the *Mount* case, this court said:

“This case is *not within* the principle of *Myles Salt Co. v. Iberia & St. M. Drainage District*, 239 U. S. 478, 60 L. ed. 392, L. R. A. 1918 E, 190, 36 Sup. Ct.

Rep. 204, where it was sought to embrace property in no wise benefited within the limits of a *drainage district.*"

The *Myles* case was also distinguished by this Court in *Valley Farms v. Westchester*, 261 U. S. 155, in which latter case this court said that the *Myles* case presented

"facts deemed sufficient to show action 'palpably arbitrary and a plain abuse' of power. Here the allegations make out *no such situation*. All lands within the district ultimately may be connected with some portion of the sewer, and we cannot say that they derive no benefits therefrom or that any were included arbitrarily or for improper purposes."

In Petitioner's Brief, at page 18, the quotations from the *Myles* case included this language "we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted imposing a burden without a compensating advantage of any kind." No municipality was involved.

In *Gaynor v. Marohn*, 268 N. Y. 417, was before the New York Court of Appeals in its consideration of the case at Bar. It must be that the New York Court considered this *Gaynor* case as not pertinent to the issues in the case at Bar. Either the *Gaynor* case in the New York Court was held not to affect the issues in this case, or the State Court has overruled it in so far as the facts in the case at Bar are concerned.

The *Gaynor* case had to do with a territorial district not co-incident with the boundaries of any municipality.

In the *Gaynor* case, a light, heat and power district within the County of Albany was created. *Territorially* and geographically four towns within the County were excluded from the district, but the bonds to be issued were a County charge. The Court held that the County could not use County money through taxation on the County as a whole to pay for lighting or power in a district territorially excluded from towns which were not to be benefited. It was not a county project. It was a project for part of a county.

The Court said:

“But *property outside the district cannot be taxed to pay for benefits within it.* * * * Of course, a county could light a particularly dark spot and make it a County charge.”

That is to say street lighting could be done in a small and restricted area within the county and be made a county charge.

In the *Gaynor* case the project did not apply to the county as such but only to a portion of the county. The towns excluded territorially were not to be lighted, nor were its schools, other town buildings or purposes to be furnished with energy. The entire argument of the court related to territorial distinctions. The court said that the State might authorize a village, as it has done in the General Municipal Law, “to establish lighting and power plants and systems”.

Section 360 of the General Municipal Law (see Appendix) neither provides for nor contemplates a territorial distinction within a municipality. The court also said:

“When we consider the extent of the State highways and the necessity for keeping them safe for night travel, we must consider that the State has the

power to furnish light for this or any other public purpose";

And the court goes on to say that the General Municipal Law gives authority to villages to do the same.

The Court would never have decided the *Gaynor* case in the manner in which it did decide it if the four towns involved had been included in the district, and if their streets were to be lighted, and they were to receive other benefits such as D.S. will receive generally and specifically as an owner of property located within the Village.

The four excluded towns could not have prevented the establishment of a district including the whole county simply because the four excluded towns for one reason or another might choose not to take. If the four towns consumed two-thirds of the energy consumed in the entire county, and were already served by an existing utility and would not consent to be served by the Municipal plant, the court in the *Gaynor* case would never have declared the project to be invalid because it did not involve a plant three times too large to furnish what would be a normal demand of the excluded towns and other towns over a period of one or more years.

Distinguishing all of the petitioner's cases, we have already shown (1) that no special district has been created by the Village; (2) that it is a municipal enterprise for a public purpose and not a local improvement district confined to territory constituting only part of the Village; (3) that the plan is logical, sane and practical, and therefore not arbitrary or involving an abuse of power; (4) that the D.S. will be benefited; (5) that the project involves a Village purpose; (6) that if any tax were to be levied (which we deny) it would be an ad valorem tax which does

not require a benefit to all; (7) that even if the plan was not intended to serve the Village for public purposes and the distribution of energy were to be made only to private consumers, the D.S. would still be benefited by reason of the fact that a plant generating energy for D.S. would involve a substantial loss in operations and a tax to D.S. whether it took energy from the Village or did not.

There are multitudinous instances where general *ad valorem taxes* are levied for municipal purposes as against taxpayers who receive no benefits, as, for example, among others, taxes against unimproved property to support a fire department; taxes to support water systems as against unimproved property; taxes to support schools as against nonresidents, or a person or corporation without children; and many others.

3. *As to the claimed denial of equal protection.*

The argument which we have advanced under Subhead 1 above (p. 11) is equally pertinent to this particular sub-head.

POINT II

The State Court did not abandon any distinctive characteristics of governmental functions as claimed by petitioner.

The question of a governmental function may be vitally important in many cases, e. g., questions of negligence; but it has little or nothing to do with the issues in this case.

The Village project provided for a public purpose when it planned to satisfy a number of Village purposes such as street lighting, operating its water plant, lighting its pub-

lie buildings and others. These were, as a matter of law, public Village purposes. (*Sun Publishing Assn. v. Mayor*, 8 A. D. 230; 152 N. Y. 257. *Palmer v. Larchmont*, 158 N. Y. 231.)

And the public purposes justify the issuance of Village bonds.

This would seem to be elementary. The incidental purpose of supplying energy to private parties did not destroy the public purpose. The supplying of energy to the Village itself was made still more economical by establishing a plant large enough to develop energy in excess of the exact requirements of the Village itself.

Section 2 of Article VIII of the New York Constitution provides:

“No county, city, town, village or school district shall contract any indebtedness except for county, city, town, village or school district purposes, respectively.”

That the Village was planning for a Village purpose is shown by the Statute under which it acted. (General Municipal Law: See Appendix.)

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated, July 1, 1944.

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